

## INDEX.

---

	PAGE
Petition for Writ of Certiorari	
Jurisdiction . . . . .	1
The Opinions of the Court Below . . . . .	2
Statute and Regulations Involved . . . . .	2
Revenue Act of 1942 . . . . .	2
Summary Statement of Matter Involved . . . . .	3
Question Presented . . . . .	4
Facts . . . . .	4
The Decisions Below . . . . .	5
Reasons Relied On for Allowance of This Writ..	6
Brief in Support of Petition for Writ of Certiorari	
Question Presented, Statement of Case, Statutes, etc. . . . .	9
Specifications of Errors and Summary of Argu- ment . . . . .	9
POINT I—The Circuit Court of Appeals erred in holding that corpus commissions paid to a New Jersey testamentary trustee in 1941 for services rendered from May 21, 1933 to Octo- ber 7, 1940, did not constitute total compensa- tion for personal services within the meaning of Section 107 of the Internal Revenue Code as amended by Section 139 of the Revenue Act of 1942. Such decision is directly contrary in principle to the decisions of the Supreme Court involving the recognition to be accorded the local law in applying a revenue measure.....	10
POINT II—An important and substantial question of Federal law is involved which has not been, and should be, settled by the Supreme Court...	15
Conclusion . . . . .	18
Appendix . . . . .	19

## TABLE OF CASES CITED:

	PAGE
<i>Additon v. Comm.</i> , 3 T. C. 427 .....	12
<i>Babbitt v. Fidelity Trust Co.</i> , 72 N. J. E. 745.....	14, 15
<i>Blair v. Comm.</i> , 300 U. S. 5 .....	7, 15
<i>Bonwit Teller &amp; Co. v. U. S.</i> , 283 U. S. 258 .....	17
<i>Civiletti v. Comm.</i> , 3 T. C. 1274, affirmed 152 Fed. 2nd 332 .....	5, 6, 7, 15, 16, 17, 18
<i>Clark v. Comm.</i> , 3 T. C. 676 .....	17
<i>Colgate-Palm-Olive-Pect Co. v. U. S.</i> , 320 U. S. 422..	17
<i>Helvering v. National Grocery Co.</i> , 304 U. S. 282.....	18
<i>Helvering v. Stuart</i> , 317 U. S. 154 .....	7, 15
<i>Interstate Transit Lines v. Comm. of Int. Rev.</i> , 319 U. S. 590 .....	18
<i>New Jersey Title Guarantee and Trust Company,</i> <i>In re Account of</i> , 76 N. J. E. 293 .....	14, 15
<i>Riggs v. Del Drago</i> , 317 U. S. 95 .....	18
<i>Slough et al. v. Comm.</i> , 147 Fed. (2nd) 836 (C. C. A., 6th Cir.) .....	18
<i>U. S. v. Merriam</i> , 263 U. S. 179 .....	18

## OTHER AUTHORITIES CITED:

Internal Revenue Code, Section 107, as amended by Section 139 of the Revenue Act of 1942, 2, 3, 4, 5, 6, 9, 10, 13	
Internal Revenue Code, Section 107 .....	7, 13, 16, 17
Judicial Code as amended, Section 240 (a) (28 U. S. C. A. Sec. 347(a)) .....	1
New Jersey Revised Statutes:	
Title 3:11-1 .....	11, 19
Title 3:11-2 .....	11, 19
Regulation 111, Sec. 29.107-1 .....	3
Senate Finance Committee, Report of, No. 648, 76th Congress, 1st Sess. ....	12

# Supreme Court of the United States

OCTOBER TERM, 1945.

No.

---

PAUL H. SMART,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

---

## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of  
the United States:*

The above named petitioner prays that a Writ of Certiorari be issued to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court (R. 86) rendered in the above case on December 6, 1945, confirming a decision of the Tax Court of the United States which had sustained a determination of the Commissioner of Internal Revenue of a deficiency of petitioner's income tax for the calendar year 1941 (R. 24). A timely petition for rehearing was denied on December 21, 1946 (R. 93).

### Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347 (a)).

### **The Opinions of the Court Below.**

The opinion of the Tax Court (R. 9-23) is officially reported in 4 T. C. 846. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 81-85) is reported in 152 Fed. 2nd 333.

### **Statute and Regulations Involved.**

The statute involved is Section 107 of the Internal Revenue Code as amended by Section 139 of the Revenue Act of 1942. The relevant portion reads as follows:

#### **Revenue Act of 1942.**

**SEC. 139. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE.**

(a) Section 107 is amended to read as follows:

**"SEC. 107. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE.**

**"(a). Personal Services:—**If at least 80 percentum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual."

(b) The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31,

1940, but with respect to a taxable year beginning after December 31, 1940, and not beginning after December 31, 1941, the period specified in such subsection shall be sixty months in lieu of thirty-six months, and the percentage specified in such subsection shall be 75 per centum in lieu of 80 per centum.

The regulations involved are Reg. 111, Sec. 29.107-1.

### **Summary Statement of Matter Involved.**

The petitioner was a testamentary trustee who qualified and acted under the laws of the State of New Jersey. During the period from 1933 to 1940 he received, at intervals, and paid an income tax in each year of receipt, commissions for collecting income computed at the statutory rate of 5%. In 1941 he received, pursuant to a decree of the Prerogative Court of the State of New Jersey, the sum of \$73,197.93 as corpus commissions for actual services rendered in administering the principal of the trust from May 21, 1933 to October 7, 1940. No previous payment for, or on account of, administering the principal had been received by, or paid to, petitioner.

The petitioner contends that the New Jersey Court found certain identifiable services to have been rendered by petitioner for administering the corpus of the trust and that the sum of \$73,197.93 was allowed as compensation therefor; that such sum constituted "total compensation for personal services" rendered by him in administration of the corpus of the trust over a period of more than sixty (60) months and that he is therefore entitled to the benefits of Section 107 of the Code as amended by Section 139 of the Revenue Act of 1942.

The Court below denied this contention and held that the aggregate of both income and corpus commissions

constitute the "total compensation for personal services"; that therefore the lump sum corpus commissions received in 1941 was less than seventy-five percent (75%) of the total compensation and the petitioner did not come within the benefits of the taxing statute.

### **Question Presented.**

Did the Circuit Court of Appeals err in holding that corpus commissions paid to a New Jersey testamentary trustee in 1941 for services rendered from May 21, 1933 to October 7, 1940, did not constitute total compensation for personal services within the meaning of Section 107 of the Internal Revenue Code as amended by Section 139 of the Revenue Act of 1942?

### **Facts.**

The facts are undisputed.

The petitioner, a New York attorney, and Josiah Macy Willets, were designated as trustees, and the Fidelity Union Trust Co. as substituted trustee, under the will of Walter G. Ladd, who died May 21, 1933. The will was probated in the Prerogative Court of the State of New Jersey on June 1, 1933 (R. 47).

The trust comprised two substantial pieces of non-income producing real property requiring an annual maintenance charge of approximately \$130,000.00, and securities and personal property valued at approximately \$10,000,000.00 (R. 27 to 29, 57).

From the inception of the trust in 1933 through the tax year 1941, the petitioner received the statutory commission of 5% on all income collected which he included

in his tax returns for the year of their respective receipts. The aggregate of such income commissions was \$68,260.90 (R. 48-49).

On October 7, 1940, the co-trustee Willets died. In November, 1941, the petitioner and the representative of the deceased trustee filed an account in the Prerogative Court of the State of New Jersey and made application, for the first time, for compensation for administering the principal of the trust from the inception thereof to the date of the death of the co-trustee (R. 48).

The application was opposed in the Prerogative Court by the life tenant and the substituted trustee, but after a hearing before the Court the objections were overruled and by decree of the Court, the petitioner and the representative of the deceased trustee were allowed the sum of \$146,395.97 which was divided equally between the petitioner and the estate of the deceased trustee (R. 64).

The petitioner apportioned, in his income tax return for the calendar year 1941, the \$73,197.93 so received over the years 1934 through 1939 in accordance with the provision of Section 107 of the Internal Revenue Code as amended by Section 139 of the Revenue Act of 1943 (R. 48-49).

The Commissioner disallowed the apportionment and determined a deficiency of \$19,043.68, and the Tax Court sustained the respondent's determination (R. 24).

The Circuit Court sustained the determination of the Tax Court.

### **The Decisions Below.**

The Tax Court considered that its decision in *Civiletti v. Commissioner*, 3 T. C. 1274, involving a New York testamentary trustee was controlling and held that in deter-

mining the petitioner's "total compensation for personal services" there must be added to his commissions for administering the principal, the commissions received by him for collecting income; and that for the purpose of applying Section 107 of the Code as amended the determination of the Court of the State of New Jersey was immaterial (R. 22) and that the petitioner received less than seventy-five percent (75%) of the total compensation in 1941 and as a consequence did not come within the benefits of the taxing statute.

The determination of the Tax Court was affirmed by the Circuit Court of Appeals. It said that "one underlying purpose of Section 107 was to relieve fiduciaries of the high surtaxes which they cannot avoid since Courts will not entertain repeated accountings"; that the case turned on whether the services for which principal commissions were awarded were separable from those for which the income commissions were awarded and concluded that "although the question is not free of doubt in the absence of some authoritative ruling to the contrary, we think that unless the State Court bases its award of commissions upon income and principal upon a corresponding separation of services, in applying Section 107 both payments should be brought into a hotchpot and the prescribed percentage computed accordingly".

### **Reasons Relied On for Allowance of This Writ.**

The Writ of Certiorari should be issued because the Court below was in error and its decision conflicts in principle with the applicable decisions of this Court holding that the determination of the valid rules of local law should be left to the local courts and holding that the Federal Courts in applying the revenue laws must give

effect to the local law (*Blair v. Comm.*, 300 U. S. 5; *Helvering v. Stuart*, 317 U. S. 154).

The Writ of Certiorari should also be issued for the reason that a substantial question of Federal law is involved which affects a large number of taxpayers and is of importance in the administration of the revenue law.

*Civiletti v. Comm.*, 152 Fed. 2nd, 332, was decided contemporaneously with the instant case by the same Court and a petition for a Writ of Certiorari is now pending in this Court. In that case the Court below was confronted with a New York testamentary trustee whose principal commissions were received in 1940 and consequently were governed by Section 107 of the Internal Revenue Code as originally enacted. The nature of the service performed and the problem of the percentage of income commissions to principal commissions were the same as in the case at bar.

In *Civiletti v. Comm.*, *supra*, the Court below ignored entirely the payment on account factor represented by the income commissions which was the basis for its decision in the instant case and rested its decision squarely upon the ground that Civiletti had failed to complete his services at the time he received his compensation. Despite its own decision in the instant case, the Court indicated that if the question had arisen under the amendment involved herein a different result would have followed for the requirement of completion had been eliminated by the amendment.

The two decisions cannot be reconciled and will create uncertainty and confusion in determining the proper application of the taxing statute in the case of trustees receiving corpus or principal commissions. An important

question of federal law is involved herein which has not been, and should be, decided by this Court.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue under the Seal of this Court to review the decision of the Circuit Court of Appeals for the Second Circuit in the above case.

Dated, New York City, March 5, 1946.

PAUL H. SMART, Petitioner,

By: JULIUS L. NEIDLE,  
Counsel for Petitioner.

